

PETROLEUM TANK RELEASE COMPENSATION BOARD  
MINUTES  
Teleconference Business Meeting  
November 17, 2008  
Department of Environmental Quality  
Metcalf Building Room 111, 1520 East 6<sup>th</sup> Avenue  
Helena, MT

Board members in attendance were Theresa Blazicevich, Greg Cross, Karl Hertel, Adele Michels, Steve Michels and Roger Noble. Also in attendance were Terry Wadsworth, Executive Director, and Pam Collins substituting for Paul Johnson, Board attorney.

Presiding Officer Cross called the meeting to order at 10:01 a.m.

**Approval of Minutes – September 15, 2008**

The first item of business was approval of the Minutes of the meeting of September 15, 2008.

Mr. Noble stated that the minutes should be corrected to indicate he acted as presiding officer in Mr. Cross's absence. The record now reflects the change.

Mr. Hertel moved to accept the minutes as corrected. Mr. Noble seconded. **The motion was unanimously approved.**

**Election of Officers**

Mr. Hertel nominated Mr. Cross for the office of Presiding Officer. Ms. Blazicevich seconded the nomination. **Mr. Cross was elected by unanimous vote.**

Ms. Blazicevich nominated Mr. Noble for the office of Vice Presiding Officer. Mr. Hertel seconded the nomination. **Mr. Noble was elected by unanimous vote.**

**Hearing Examiner Decision and Order – Cenex Marketing & Supply, Fac ID 21-07467, Rel. #826 (Milk River Coop), Havre**

Mr. Wadsworth provided a summary of the matter to date. The release was discovered in 1991. An Administrative Order (AO) was issued in 2006 due to noncompliance identified in a routine inspection conducted in 2005. The noncompliance included failure to perform release detection monitoring. The Board staff recommended the Board impose 100% reduction in reimbursement pursuant to ARM §17-58-326, because, the operator, Milk River Cooperative, was subject to the AO for more than 180 days. The Board, after having heard the matter at their July 23, 2008 meeting, rejected the staff recommendation and imposed a reduction in reimbursement of 40%. Milk River appealed the decision and requested a Montana Administrative Procedure Act (MAPA) hearing.

Following discovery, the Board filed a motion for summary judgment. On September 24, 2008 the hearing examiner issued a memorandum order granting the Board's request for summary judgment and affirming the Board's decision to reduce Milk River's reimbursement rate. The hearing examiner rejected Milk River's attempt to re-litigate the key substantive finding in the AO, that Milk River failed to comply with the release detection monitoring and record keeping requirements. He found that the AO was final and that Milk River was precluded from challenging DEQ's final finding of noncompliance in a later proceeding before the Board. In addition, he found that the Board's decision to reject the staff's recommendation to reduce reimbursement by 100% was not arbitrary and capricious, nor an abuse of the Board's discretion. Neither party has filed any exceptions to the hearing examiner's order, nor requested oral argument as allowed under MAPA. The Board must now decide whether to adopt the hearing examiner's September 24, 2008 Opinion and Order as the Board's final decision, pursuant to §2-4-621, MCA

Mr. Noble moved to ratify and adopt the hearing examiner's opinion and order as presented. Mr. Hertel seconded. **The motion was unanimously approved.**

**Hearing Examiner Decision and Order – Hightower Property, Fac ID 56-14109, Rel. #4274, Silver Gate**

Until recently, Mrs. Hightower was represented in this appeal of eligibility determination by Lee Bruner of Poore, Roth & Robinson. Mr. Bruner's recent motion to withdraw as counsel was granted by the hearing examiner, who required

the Board to notify Mrs. Hightower of the withdrawal and that she was required to appear in person or appoint new counsel. Upon receipt of the notification, Mrs. Hightower requested that Mr. Bruner remain her counsel long enough to dismiss the action. Mr. Bruner agreed, and filed a Stipulation of Dismissal on October 28, 2008. On October 31, 2008, the hearing examiner issued an order dismissing the claim with prejudice. The Board must now decide whether to adopt the hearing examiner's October 31, 2008 order as the Board's final decision.

Ms. Blazicevich moved to adopt the hearing examiner's order. Ms. Michels seconded. **The motion was unanimously approved.**

#### **Eligibility Ratification**

Mr. Wadsworth informed the Board of the applications for eligibility that are before the Board. The staff recommended that two releases be determined eligible. (See table below).

Board Staff Recommendations Pertaining to Eligibility From September 4, 2008 thru November 5, 2008				
Location	Site Name	Facility ID #	DEQ Release # Release Year	Eligibility Determination – Staff Recommendation Date
Hardin	Hardin Interstate Texaco	02-00538	4619 Dec 2007	Eligible – 9/19/08
Billings	Flying J Travel Plaza	56-12585	4600 July 1998	Eligible – 9/24/08

Mr. Noble commented that the Flying J release was discovered in 1998 and that he recalled a discussion concerning a seven-year time limit for submission of applications as a result of the subrogation program being conducted by outside counsel.

Mr. Wadsworth stated that there currently is no statute of limitations on eligibility applications. The Board's subrogation program was aimed at recovering costs from insurance companies for releases that were discovered after 1989. The insurance companies argued that the contractual obligations for reimbursing on some of the releases at issue in the litigation had run its course. The Supreme Court ruled in favor of the insurance companies, stating that the Board did not have the ability to request reimbursement that is older than contractual obligation. The Board does not have the ability to seek reimbursement from the insurance companies for claims on releases that are more than eight years old. In the case of the Flying J release (Release #4600), the Board will not be able to recover any costs associated with the cleanup of the release, because the release was discovered more than eight years ago. As a result of that Montana Supreme Court decision, the Board's proposed 2009 legislation includes a one-year statute of limitations after release discovery for application for eligibility.

Ms. Michels moved to ratify the eligibility applications as listed. Mr. Hertel seconded. **The motion was unanimously approved.**

#### **Claims over \$25,000**

Mr. Wadsworth presented the Board with the claims for an amount greater than \$25,000 reviewed since the last Board meeting. (See table below). There are nine claims totaling an estimated \$564,526.32. He pointed out the last column of the table, which indicates the estimated amount to be reimbursed. Three of the claims in this table, for City Service West site (a/k/a Michael's), are subject to an Administrative Order penalty of 50% of the eligible amount claimed.

With respect to the Town Pump Havre claim (20080924P), the owner and its consultant do not believe the contamination addressed in the claim is attributable to the Town Pump release (Release # 4167). This claim was a result of a Montana Department of Transportation road improvement project in Havre. There is technical information available that indicates the contamination under the street may not be a result of the release at the Town Pump facility. DEQ is reviewing the technical information to resolve the issue. The claim will remain suspended until that time.

Mr. Hertel moved to ratify the claims greater than \$25,000 listed in the table, with the exception of claim #20080924P, Town Pump Havre. Ms. Michels seconded. **The motion was unanimously approved.**

Mr. Hertel asked how the cleanup of the City Service West (Michael's) release is progressing. Sandi Olsen, Remediation Division Administrator, said DEQ would bring a report on the release to the next Board meeting.

CLAIMS OVER \$25,000							
Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Adjustments	Co-pay Met with this claim	**Estimated amount to be reimbursed
Havre	Flying J	2108665	20080513A	101,415.62	\$33,878.10		\$67,537.52
Butte	Flying J	4709893	20080513B	\$145,899.57	\$11,437.99		\$134,461.58
Kalispell	City Service West (Michael's)	1502330	20080617B	\$36,212.40	\$612.01		\$17,800.20 A.O. penalty deducted
Kalispell	City Service West (Michael's)	1502330	20080708A	28,409.65	\$820.95		\$13,794.35 A.O. penalty deducted
Location	Facility Name	Facility ID#	Claim #	Claimed Amount	Adjustments	Co-pay Met with this claim	**Estimated amount to be reimbursed
Kalispell	City Service West (Michael's)	1502330	20080708B	\$260,236.55	\$13,262.89		\$123,531.83 A.O. penalty deducted
Bozeman	Kwik Way 32	1605094	20080828G	\$31,275.96	\$1,209.37		\$15,033.30
Havre	Golden Spike	9995052	20080924N	\$82,040.99		X	\$64,717.24
†Havre	Town Pump	2108705	20080924P	\$106,197.00	\$5,235.69		\$100,961.31
Havre	Holiday Stationstore 272	2108068	20080924Q	\$26,688.99			\$26,688.99
<b>Total</b>				\$818,376.73			\$564,526.32

### Weekly Reimbursements

Mr. Wadsworth presented the summary of weekly claim reimbursements for the weeks of September 10, 2008 through October 29, 2008 to the Board for ratification. (See table below). There were 179 claims, totaling \$741,341.61.

<b>WEEKLY CLAIM REIMBURSEMENTS</b> <b>November 17, 2008 BOARD MEETING</b>		
<u>Week of</u>	<u>Number of Claims</u>	<u>Funds Reimbursed</u>
September 10, 2008	22	\$96,547.57
September 17, 2008	26	\$60,524.75
October 1, 2008	14	\$199,879.25
October 8, 2008	36	\$89,136.28
October 15, 2008	18	\$99,247.14
October 22, 2008	22	\$83,265.55
October 29, 2008	41	\$112,741.07
<b>Total</b>	<b>179</b>	<b>\$741,341.61</b>

Because there were three large dollar claims paid on the site during this period, Mr. Hertel asked for an update on the Elmer's site in Great Falls. He asked if the soil excavation is complete, what remains to be done, and whether all the claims have been received.

Presiding Officer Cross remarked that there will most likely be continued monitoring on the site, even after the excavation is complete.

Sandi Olsen, Remediation Division Administrator, stated that DEQ will provide a status report on the site at the next Board meeting.

Mr. Noble asked for clarification of the task description, listed as miscellaneous, for several claims on the Grain Growers site in Scobey. Mr. Wadsworth stated that the work performed was related to installation of cement curbs and replacement of water lines. There are not specific tasks for these activities and they were therefore placed under "miscellaneous."

Presiding Officer Cross asked the Board staff to notify owners/operators who are approaching the maximum allowed reimbursement that they will no longer be eligible for reimbursement from the Fund once the maximum has been reached.

Mr. Hertel moved to ratify the weekly reimbursements as presented. Ms. Blazicevich seconded. **The motion was unanimously approved.**

#### **2009 Board Meeting Dates**

Mr. Wadsworth presented proposed meeting dates for calendar year 2009, as shown below. The Board is required by law to meet at least quarterly.

<u>Meeting Date</u>	<u>Pre- Meeting Date</u>	<u>Packet Mailing Date</u>
January 12, 2009	December 18, 2008	December 23, 2008
March 16, 2009	Feb 26, 2009	Mar 5, 2009
May 18, 2009	May 7, 2009	May 14, 2009
July 27, 2009	July 9, 2009	July 16, 2009
September 28, 2009	September 10, 2009	September 17, 2009
December 7, 2009	November 12, 2009	November 19, 2009

Mr. Noble moved to ratify the meeting dates as proposed. Mr. Michels seconded. Ms. Blazicevich stated that she may have a conflict with the July and September meeting dates. **The motion was unanimously approved.**

#### **Minimum Claim Policy**

Mr. Wadsworth provided an update to the Board on the staff's proposed revision of the minimum claim amount policy. The staff had recommended that the allowed minimum claim amount be set at \$1000.00, which is the estimated cost to the Fund for processing a claim. The Board had asked the staff to present the proposed revision to the consultants at a recent DEQ consultant's meeting. The attendees at that meeting reached a consensus to recommend revising the minimum claim amount from the current \$200.00 to \$500.00, and to make the effective date of the revision January 1, 2009.

Presiding Officer Cross stated that there has been an effort to make sure the claimant is adequately covered and that reasonable exceptions have been addressed and documented in the drafting of this revision.

Mr. Hertel moved to ratify the recommendation to revise the minimum claim policy as proposed and make the effective date January 1, 2009. Ms. Blazicevich seconded. **The motion was unanimously approved.**

#### **2009 Proposed Legislation**

Mr. Wadsworth presented the current proposed legislation to the Board. The Board's legislation has been designated LC402. He explained the proposed changes: §75-11-307(4)(a) and (b) revises the co-pay for double wall tanks as a result of the Energy Policy Act of 2005; §75-11-307(5)(a), (b), and (c) relates to the insurance incentive the Board is trying to enact; §75-11-308 provides a statute of limitations for submission of an eligibility application, and a

requirement that an owner/operator notify their insurance carrier of a release within the time required by the insurance policy; §75-11-307(6) is a housekeeping item concerning subrogation; §75-11-309(4) addresses time limits on appeals of Board actions; the fund balance control changes; and various dates have been removed from the statute by the legislative division. He stated that there is no action required by the Board at this time, unless the Board wishes to make substantial changes to the current language.

Mr. Noble agreed with the current proposed changes and asked for the Petroleum Marketers Association comments, and whether it is too late to have other legislation drafted to address other issues.

Mr. Wadsworth stated that the bill can be changed in the legislature, and if there is a legislator who wishes to make a change, that may be possible.

Ronna Alexander, Petroleum Marketers Association, stated that the one year statute of limitations for eligibility is a concern to the Association. The Association will also oppose, in §75-11-309, the language that will require someone to notify the Board within 30 days if they have a problem with a Board determination. The Association does not believe that provision belongs in the statute, but possibly in rule. They do not feel either provision does enough to help the financial position of the Fund.

Mr. Wadsworth explained that the statute of limitations provision is written to require that any release that has already been discovered would have until January 1, 2010 to apply for eligibility. Application for any new release would need to be submitted within one year after discovery. This provision was developed because of the Supreme Court's determination with regard to the time limit for filing claims. In addition, the 2003 Legislative Audit report criticized the Board for not having a good evaluation of its potential overall liabilities. This provision would help limit the Board's unknown liabilities to those releases discovered within a one year time frame. If the deadline is set out farther, the size of the unknown liabilities is greater, and the available time to file subrogation claims against the owner/operators' insurers is also shorter. He stated that, should the statute of limitations be enacted, the staff would develop a notification program to ensure that owners/operators are aware of the time limit. He acknowledged that this provision will probably result in an increase in the number of releases for which eligibility is applied, because owners/operators will not be willing to risk waiting to see if the cost of a cleanup will be small.

Ms. Alexander said that the Petroleum Marketers Board would be discussing the Petro Board's proposed legislation and would try to make suggestions for a different approach.

The Board decided not to take action on the proposed legislation, but to wait to review any suggestions made by the Petroleum Marketers Association. The Board asked Mr. Wadsworth to provide those suggestions to the Board and if necessary convene a teleconference meeting to address them. Otherwise, the status of the legislation will be revisited again at the January Board meeting.

#### **Fund Solvency Workgroup Update**

Mr. Wadsworth provided an update on the Fund Solvency workgroup activities. The workgroup met on October 30, 2008. Topics discussed included: mixing zones; the AST inspection program proposal; encouraging owners/operators to use private insurance coverage; risk based cleanup standards such as Tier I and Tier II standards, possibly combined with mixing zones; groundwater management and trying to secure a "No Further Action" letter as part of the groundwater management designation; groundwater monitoring and the Department's efforts to reduce the frequency of monitoring and the number of constituents addressed; indoor air quality and developments in the federal regulatory programs; area management and the Department requesting electronic data deliverables from the consultants.

The group suggested that the Board's attorney look into the possibility of the Board using a mixing zone concept to address cleanup. He will bring a report to the Board in the future.

The AST inspection program is not in the 2009 proposed legislation, in part because the Governor's office asked that the Board broaden its outreach to a larger group of potentially affected parties. In addition, the current status of the Fund indicates that this is not the optimum time to begin a new program that may result in the identification of new releases. The Board staff will put the inspection checklist, which has been reviewed by the Fire Marshall's office, on the Board's website and include that information in its outreach to AST owners.

Mr. Noble suggested, with regard to the indoor air quality issue, that the Board move cautiously and keep an eye on developments in other states before moving forward. With respect to risk-based evaluation of contamination, he said it would be helpful if Montana could develop Tier II or Tier III groundwater evaluation process, similar to the ASTM method.

Ms. Olsen stated that the Department will address water quality cleanup issues with its water quality law experts and bring any pertinent information to the workgroup's attention

### **Fiscal Report**

Mr. Wadsworth presented the fiscal report as of October 31, 2008. There were no issues that he felt required special mention. There were no comments or questions from the Board members or the audience with regard to the fiscal report..

### **Board Attorney Report**

Mr. Wadsworth believes that several parties have been awaiting the disposition of the Cenex Supply and Marketing case before moving forward with their own appeals. The staff has recently notified several of the appellants listed on the table below that the Cenex case has been concluded and the Board is still waiting for notification of the identity of the appellant's attorney before the case can move forward. The Hightower property in Silver Gate and the Cenex Supply and Marketing matter were addressed at the beginning of the meeting.

Location	Facility	Facility # & Release #	Disputed/ Appointment Date	Status
Boulder	Old Texaco Station	22-11481 Release #03138	Eligibility 11/25/97	Dismissal pending because cleanup of release completed.
Thompson Falls	Feed and Fuel	45-02633 Release #3545	Eligibility	Case was stayed on 10/21/99.
Eureka	Town & Country	27-07148 Release #03642	Eligibility 8/12/99	Hearing postponed as of 11/9/99.
Butte	Shamrock Motors	47-08592 Release #03650	Eligibility 10/1/99	Case on hold pending notification to Hearing Officer.
Whitefish	Rocky Mountain Transportation	15-01371 Release #03809	Eligibility 9/11/01	Ongoing discovery. No hearing date set.
Lakeside	Lakeside Exxon	15-13487 Release #03955	Eligibility 11/6/01	In discovery stage.
Helena	Noon's #438	25-03918 Release #03980	Eligibility 2/19/02	Case stayed.
Belt	Main Street Insurance	07-01307 Release #3962		Eligibility tabled 6/25/01 currently insurance coverage
Great Falls	On Your Way	07-09699 Release #3633	Reimbursement adjustment	<b>Hearing requested 2/15/07 Awaiting identification of attorney</b>
Lewistown	On Your Way	14-09853 Release #3790	Eligibility contested	<b>Hearing requested 2/15/07 Awaiting identification of attorney</b>
Whitefish	Stacey Oil - Don Gray	15-04428 Release #1034	Reimbursement adjustment	<b>Hearing requested 2/15/07 Awaiting identification of attorney</b>
Silver Gate	Hightower property	56-14109 Release #4274	Eligibility contested 5/29/07	<b>Dismissed</b>
Havre	Cenex Supply & Marketing	21-07467 Release #826	Reimbursement adjustment 8/14/07	<b>Board to vote on HE Order</b>
Kalispell	City Service West	15-02330 Release #1208	Eligibility Contested 12/6/07	<b>Hearing requested 12/6/07 Awaiting identification of attorney</b>
Hamilton	North Star Aviation	99-95007 Release #4668	Eligibility contested 9/23/08	<b>Hearing requested 9/23/08. Awaiting identification of attorney</b>

## **Board Staff Report**

Mr. Wadsworth presented the Board staff report. He pointed out that the dollar value of claims received in September was much higher than usual, at \$1.4 million. Much of that number is the result of a soil excavation conducted at the Cascade County Shops site in Great Falls. Claims for that work totaled approximately \$600,000. As a result of those claims, there is a backlog of claims to be paid of approximately \$1.5 million. The staff is trying to pay claims within 90 days, but may be moved out to 120 days.

He also said that the value of corrective action plans received has been declining for several months, and have been lower than for the same month the previous year. This may help bring the claim activity back into balance over time.

Presiding Officer Cross stated for the record that the Board appreciates the efforts of the consultants to bring the costs into line with what revenue is available, and the willingness of the Department to work with consultants to develop less expensive work plans.

Mr. Wadsworth said that the number of work plans in the priority one group is fewer than in recent months. Most of those remaining in the priority 1 group are priority 1.4. The total cost of all work plans that remain to be obligated is roughly \$2.0 million. Mr. Wadsworth reminded the members that the staff has developed a protocol to bring work plans with costs greater than \$100,000 before the Board for their review before obligating those plans. He asked if this protocol is acceptable, or if the Board wishes to change this process.

Presiding Officer Cross stated that he would like to continue to get a brief report and explanation of work plans for more than \$100,000. He does not want the process to become burdensome to either the Board or the DEQ and PTRCB staffs.

Mr. Trombetta suggested that, should the Board have questions on the summaries provided in the packet, the members email the questions to DEQ before the meeting, to allow DEQ time to prepare a response. Copies of the work plan could be made available in PDF format for the Board's review, if desired.

Ms. Blazicevich suggested that DEQ prepare a PowerPoint presentation on the work plans over \$100,000, and make the work plans available for the Board, so that the Board can see where its money is being spent.

After some discussion it was decided that DEQ would prepare a summary paragraph for work plans larger than \$100,000. The Board would determine whether there are any for which they wish to have more information. DEQ will prepare a more extensive presentation for each one requested by the Board.

## **Petroleum Technical Section Report**

Mr. Trombetta provided the PTS report. He stated that the Petroleum Technical Section is short four staff members, including the section manager. This is one reason the number of work plan approvals is down.

Since the last Board meeting, four new releases were reported and ten releases were closed. For calendar year 2008, 18 new releases have been reported and 48 have been closed, leaving 1640 active releases, roughly two-thirds of which are Fund eligible.

Mr. Trombetta reported that the soil excavations at the two sites in Scobey (Grain Growers and Nash Brothers) were very successful. There was some residual contamination at each site, due to the presence of structures, property lines and roads. Groundwater monitoring wells that were destroyed in the excavations will be replaced and monitored. After two consecutive events with results beneath RBSLs, the releases will be considered for closure.

Mr. Trombetta stated that the Department is required under the Energy Policy Act of 2005 to report sources and causes of releases on the federal fiscal year, starting this year. They are preparing this report for the fiscal year ended October 1, 2008. It will be available for the next Board meeting.

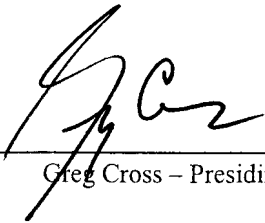
## **Public Forum**

Brian Goodman, Department of Transportation, addressed the Board. MDT reconstructed the highway in Havre over the past 18 months. MDT only became aware of the penalty applied to the Cenex Supply and Marketing site after the

reconstruction was completed. He has been told by Board staff that MDT's claim will be subject to the penalty, as will all other claims on that site. MDT does not agree with that determination and will bring the matter up at the next Board meeting. MDT has been designated to receive payment, and will be penalized 40% through no fault of their own.

Mr. Wadsworth stated that MDT would receive payment for the eligible portion of the claim from the Fund, and would need to deal directly with Cenex for the remainder of the claim amount.

The meeting adjourned at 12:19 p.m.



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Greg Cross – Presiding Officer